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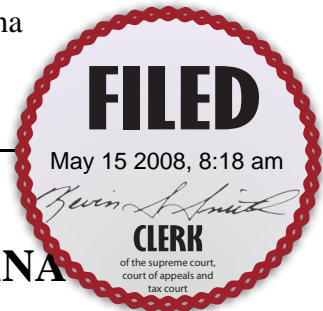
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**IN THE
COURT OF APPEALS OF INDIANA**



CHARLES R. BARNETT, JR.,

Appellant-Defendant,

VS.

STATE OF INDIANA,

Appellee-Plaintiff.

$$\begin{array}{c}) \\) \\) \\) \\) \\) \\) \\) \end{array}$$

No. 45A05-0708-CR-466

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Thomas P. Stefaniak, Judge
Cause No. 45G04-0602-FB-14

May 15, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Charles R. Barnett, Jr. was convicted of two counts of Dealing in a Controlled Substance,¹ both as class B felonies, and was found to be a Habitual Substance Offender.² Barnett presents a single issue for review: Did conviction of two counts of dealing in a controlled substance violate double jeopardy principles under the Indiana Constitution?

We affirm.

The facts favorable to the convictions are that on January 28, 2006, Detective Troy Campbell of the Gary Police Department (the GPD) participated in a sting operation with other members of the GPD. Through a “source”, he arranged to buy \$100 worth of Oxycontin pills from Barnett. Campbell and the source met Barnett at the pre-arranged location, where Barnett got into the back seat of Campbell’s car. Campbell gave Barnett \$100 and Barnett gave Campbell a plastic baggie containing four Oxycontin pills. At that point, Campbell exited his vehicle and alerted GPD officers waiting nearby that the transaction had been completed and they could move in and arrest Barnett.

After the GPD officers moved in, Barnett was ordered to exit the vehicle. After he did, Sergeant Kirk Banker observed conspicuous bulges in Barnett’s pants pockets. Officers searched Barnett’s pockets and recovered three bottles. One contained ten Oxycontin pills, one contained five Oxycontin pills, and the remaining bottle held eleven foil packets containing a mixture of powdered Oxycontin and a non-controlled substance.

¹ Ind. Code Ann. §§ 35-48-4-2(a)(1)(C) (delivery) and (a)(2)(C) (possession with intent to deliver), respectively, (West, PREMISE through 2007 1st Regular Sess.).

² Ind. Code Ann. § 35-50-2-10 (West, PREMISE through 2007 1st Regular Sess.).

On February 1, 2006, Barnett was charged with one count of delivering a controlled substance (Oxycontin), one count of possessing with intent to deliver a controlled substance, and was alleged to be a habitual substance offender. Following a June 4-5, 2007 jury trial, Barnett was found guilty as charged and also found to be a habitual substance offender.

Barnett contends that entering judgment of conviction on two counts of dealing in a controlled substance violated double jeopardy principles. He contends: “Barnett was charged separately under both [I.C. § 35-48-4-2(a)(1)(C) and (a)(2)(C)] for conduct occurring at the same place, on the same date, and at the same time. He claims that double jeopardy considerations preclude his conviction here for both delivery of that drug and possession of it with intent to deliver.” *Appellant’s Brief* at 4.

Barnett brings his double jeopardy challenge under the Indiana Constitution, i.e., article 1, § 14, which provides, “[n]o person shall be put in jeopardy twice for the same offense.” The double jeopardy analysis under this provision involves dual inquiries under what have come to be known as the “statutory elements test” and the “actual elements test.” *Davis v. State*, 770 N.E.2d 319, 323 (Ind. 2002). Barnett contends his conviction of two delivering offenses violates the actual evidence test. That is, the evidentiary facts used by the jury to establish the essential elements of the delivering offense were also used to establish all of the elements of the possession-with-intent-to-deliver offense.

Multiple convictions are prohibited under the actual evidence test if there is ““a reasonable possibility that the evidentiary facts used by the fact-finder to establish the elements of one offense may also have been used to establish the essential elements of a second challenged offense.”” *Id.* at 323 (quoting *Richardson v. State*, 717 N.E.2d 32, 53 (Ind. 1999)). ““Application of the actual evidence test requires us to identify the essential elements of each challenged crime and to evaluate the evidence from the jury’s perspective, considering where relevant the jury instructions, argument of counsel, and other factors that may have guided the jury’s determination.”” *Caron v. State*, 824 N.E.2d 745, 753 (Ind. Ct. App. 2005) (quoting *Lamagna v. State*, 776 N.E.2d 955, 959 (Ind. Ct. App. 2002)), *trans. denied*. ““Indiana’s double jeopardy clause is not violated when the evidentiary facts establishing the essential elements of one offense also establish only one or even several, but not all, of the essential elements of a second offense.”” *Id.* (quoting *Lamagna v. State*, 776 N.E.2d at 959).

In this case, the State contends that the delivering conviction was based upon the Oxycontin pills that Barnett sold to Detective Campbell, while the possession-with-intent-to-deliver conviction was based upon the substances found in the three bottles discovered on Barnett’s person in the search following his arrest. The foregoing analysis requires that we determine whether there is a reasonable possibility that the evidentiary facts used by the jury to establish the elements of the delivering offense may also have been used to establish the essential elements of the possession-with-intent-to-deliver offense. *See Davis v. State*, 770 N.E.2d 319.

The charging informations relating to the two offenses did not clarify that one count concerned the pills Barnett sold, while the other concerned the pills found in his pockets following his arrest, viz.,

COUNT I

[DEALING IN A CONTROLLED SUBSTANCE (CLASS B FELONY)]

... **CHARLES B. BARNETT, JR.**, knowingly or intentionally did deliver a schedule II controlled substance: to wit Oxycodone (Oxycontin), (pure or adulterate), contrary to I.C. 35-48-4-2(a)(1)(C) and against the peace and dignity of the State of Indiana.

COUNT II

[DEALING IN A CONTROLLED SUBSTANCE (CLASS B FELONY)]

... **CHARLES B. BARNETT, JR.**, possess [sic] with intent to deliver a schedule II controlled substance: to wit Oxycodone (Oxycontin), (pure or adulterate), contrary to I.C. 35-48-4-2(a)(2)(C) and against the peace and dignity of the State of Indiana.

Appellant's Appendix at 8. The failure to distinguish between the two in the charging informations, however, is not dispositive. As indicated above, we also consider where relevant the jury instructions, argument of counsel, and other factors.

Beginning with the instructions, the jury was instructed in relevant part that it could convict Barnett of Count I if it found that the State proved beyond a reasonable doubt that Barnett (1) knowingly or intentionally (2) delivered Oxycontin (3) in a pure or adulterated state. The jury was also instructed that it could convict Barnett of Count II if it found that the State proved beyond a reasonable doubt that Barnett (1) knowingly or intentionally (2) possessed with the intent to deliver Oxycontin (3) in a pure or adulterated state. These instructions were framed in the same fashion as the broadly

worded charging informations and, being general in nature, suffer the same potential infirmity with respect to article 1, § 14. Were our decision based only upon the charging informations and the jury instructions, we might be inclined to agree with Barnett's double jeopardy argument. An examination of the presentation of evidence and argument at trial, however, compels the opposite result.

In *Storey v. State*, 875 N.E.2d 243 (Ind. Ct. App. 2007), *trans. denied*, this court was presented with essentially the same argument that Barnett presents here on similar facts. In that case, Storey was arrested and found to be in possession of finished methamphetamine weighing 34.789 grams and unfinished methamphetamine that, if finished, would have yielded approximately 28 grams. He was convicted of both possessing and manufacturing methamphetamine. He contended that conviction of both offenses violated double jeopardy under the Indiana Constitution.

The State argued the convictions did not violate double jeopardy principles because they were supported by two separate and distinct instances of criminal conduct. Specifically, the State argued that the finished product supported the possession conviction and that the unfinished product supported the manufacturing conviction. This court evaluated that claim by scrutinizing the presentation of evidence at trial and examining the State's closing argument. In the end, we concluded that the convictions did not violate double jeopardy, stating:

It is evident to us that the State carefully parsed the evidence pertaining to both the possession and manufacturing offenses. In doing so, the State set forth independent evidence that Storey (1) possessed methamphetamine in

excess of three grams with the intent to deliver and (2) manufactured methamphetamine in excess of three grams. Under these circumstances, the State sufficiently distinguished the possession offense from the manufacturing offense and provided independent evidence to support both convictions.

Id. at 250. Did the State “carefully parse” the evidence relative to the two separate offenses in this case? We conclude that it did.

In her opening comments, the deputy prosecutor explained to the jury the facts of the drug sale between Barnett and Detective Campbell, most notably that it involved the exchange of pills for money. She then explained to the jury:

The first count that Mr. Barnett is charged with is dealing in a controlled substance, which reads that on January 28th of 2006, Charles Barnett, Jr. did knowingly or intentionally deliver a controlled substance, to-wit: a schedule II controlled substance, Oxycontin. On the second charge that he is charged with is [sic] very similar to the first, but there is an additional element that the State needs to prove. That he possessed additional narcotics, schedule II narcotics, with the intent to deliver those narcotics.

When Mr. Barnett was arrested, Sergeant Banker of the Gary Police Department searched him and found evidence to the effect that he had a large quantity of pills on him that had just been filled with a prescription. He had less pills than he should have had. And evidence will show that.

Detective Campbell will tell you what the defendant said to him on the phone. He was there. He will tell you that the defendant gave him the money or gave him the drugs after he gave him the money. Sergeant Banker will tell you what he found on Mr. Barnett when he searched him incident to that arrest.

* * * * *

And at the close of the evidence, the State will ask you to find Mr. Barnett guilty of Count I: Dealing in a Controlled Substance, the actual delivery to Detective Campbell, and Count II: The Possession of a Controlled substance, schedule II controlled substance with the intent to deliver, based on the amount of the drugs that were found on Mr. Barnett after he was searched.

Transcript at 8-10. In closing argument, the deputy prosecutor stated as follows:

This case is simple [sic] fact pattern; the buying and selling of prescription drugs. And whether they are legally obtained or not is not the issue. It is what you do with those drugs once they are in your possession. And what did Mr. Barnett do? He sold those drugs to Detective Campbell.

And when he was arrested, as you can see with all of the items that were taken out of his pocket, he had individually wrapped another set of drugs. The tinfoil, little pieces of tinfoil had powder residue on them that were Oxycontin.

* * * * *

And based on the evidence that the State has presented, I submit to you that we have met our burden of proof. Take a look at Count I, the delivery of a controlled substance. What has the State proven in that respect? Number one, a knowingly [sic] and intentional transfer. We have Detective Campbell testifying that he received four pills for a hundred dollars.

We also have the first audio tape where Mr. Barnett says I can sell you the Oxy. Go ahead and meet me at the White Castle. They get to the White Castle. No, go ahead and meet me at the Citgo. They do. And it is transferred.

* * * * *

On Count number 2, what has the [S]tate shown you that the defendant possessed those drugs with the intent to deliver? Whether legal or not, you're not going to have ten little pieces or eleven little pieces of tinfoil with crushed up pieces of powder in them unless you intend to sell them individually. One might even say they are individualized for sale.

You're not going to have all of these pill bottles with ten pills here, four pills there. They are all the same pills. Unless you intend to hold them so you can sell them to someone. Those pills and little pieces of tinfoil were analyzed to contain Oxycontin. They are also schedule II.

Id. at 102-04.

After examining the State's opening and closing arguments, as well as the presentation of its case, it is evident to us that the State carefully parsed the evidence

pertaining to both the delivering and possession-with-intent-to-deliver offenses. In doing so, the State set forth independent evidence that Barnett (1) delivered Oxycontin to Detective Campbell, as alleged in Count I, and (2) possessed Oxycontin, separate from that which he delivered to Detective Campbell, with the intent to deliver same, as alleged in Count II. Under these circumstances, the State sufficiently distinguished the possession offense from the actual delivery offense and provided independent evidence to support both convictions. We therefore cannot say Barnett's possession and delivering convictions violate article 1, § 14 of the Indiana Constitution.

Judgment affirmed.

KIRSCH, J., and BAILEY, J., concur.